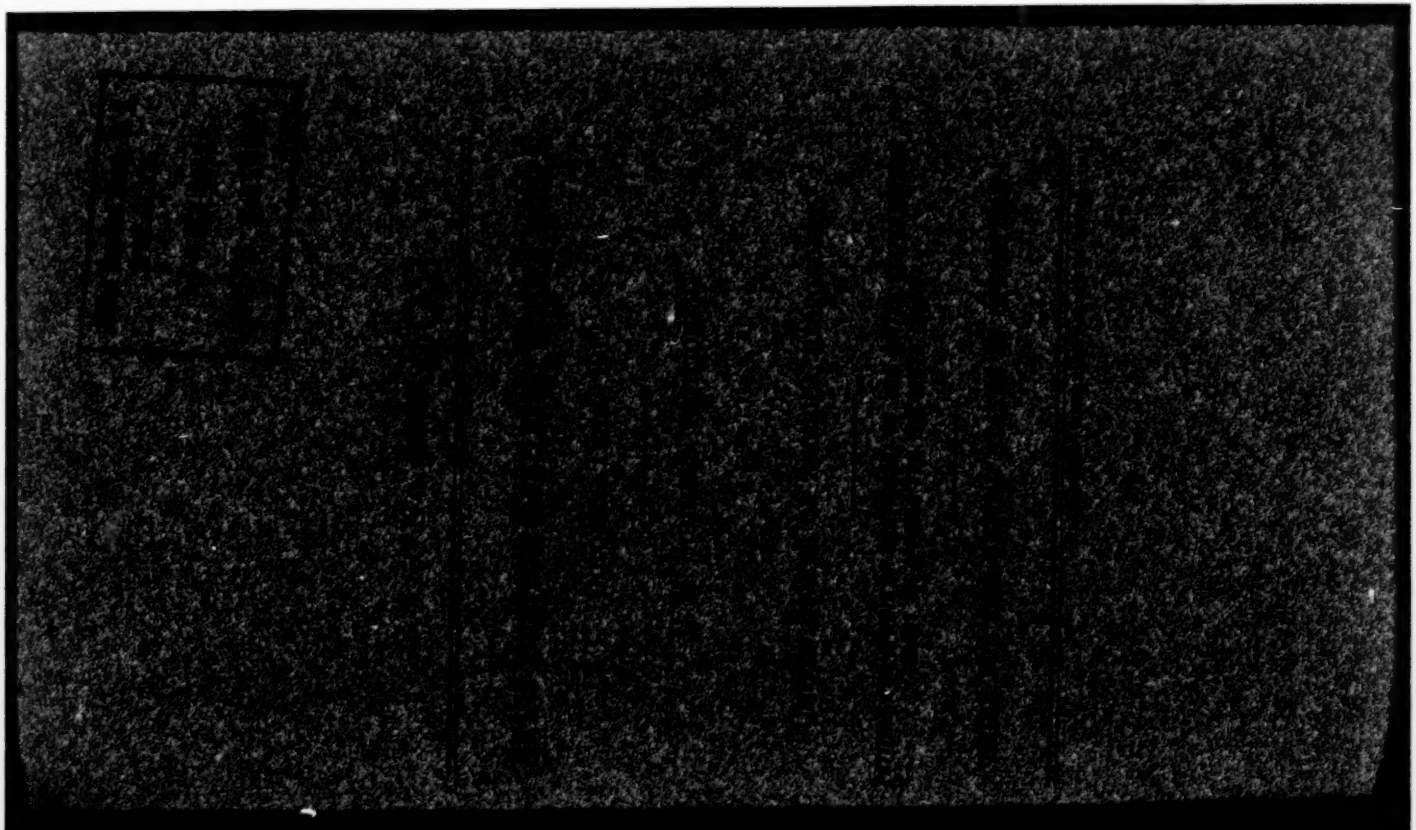

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

C. M. SUMMERS, PETITIONER,
v.
UNITED STATES OF AMERICA, RESPONDENT. } No. 1045.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES IN OPPOSITION.

This case does not involve the right to trial by jury on a charge of crime, but presents simply a question of pleading—whether an indictment found in the district court for Alaska for violating the national banking law may contain more than one count.

Petitioner, who was president of a national bank in Juneau, was indicted for violating section 5209 of the Revised Statutes, and, as is usual in such cases, the indictment contained a number of counts, 56 in all; the counts charged the making of false entries in the books of the bank and in the reports to the Comptroller of the Currency and the abstraction and misapplication of the funds of the bank.

Petitioner's demurrer, based on the ground of misjoinder was overruled, and he pleaded not guilty. (R.,

142–144.) Instead of going to trial, he later withdrew his plea, and reentered his demurrer, which was again overruled. (R., 163–4.)

Petitioner then moved for a continuance. (R., 164.) Evidently this motion was about to be denied, and an immediate trial had, when he gave notice of his election to stand on his demurrer and not further plead, to take advantage of section 97 of the Alaska Criminal Code of Procedure, to submit to judgment on his demurrer, and to forthwith appeal to the Circuit Court of Appeals. (R., 171, 2.) The United States attorney objected to this course, urging that the court enter a plea of not guilty for petitioner (R., 172), and the matter was argued on both sides. The court concluded that petitioner might lawfully stand on his demurrer and be sentenced, and imposed the minimum sentence of five years. (R., 180–185.) When petitioner was asked if he had anything to say why sentence should not be pronounced against him, he answered that he had nothing to say except that he desired "to test his demurrer upon appeal." (R., 184.)

In short, the question was whether the petitioner should be tried on one indictment containing 56 counts, or on 56 indictments of one count each, and which might have been consolidated for trial in the discretion of the trial court. As a practical matter the question seems of little importance.

Petitioner properly raised his question by demurrer and was in a position to avail himself of the point on appeal if he should be convicted. Instead

of pursuing the orderly procedure, he insisted upon staking his entire case on this one question of pleading, and there is no reason why this court should issue the extraordinary writ of certiorari to enable him to test his question for the third time.

Petitioner having thus induced the trial court to impose sentence on him, now urges that he led the court into error because the sentence deprived him of his constitutional right to trial by jury and was therefore illegal.

Even if the petitioner were deprived of a constitutional right, the fact that such deprivation was the result of his own urgent solicitation will not be very persuasive in inducing this court to come to his relief.

But the petitioner was not deprived of any right. In fact, his counsel did not think enough of the proposition to put it in the assignment of errors (R., 189).

Petitioner was, of course, entitled to a trial by jury, but he could waive the right either by pleading guilty or by standing on his demurrer and submitting to judgment.

In fact, the common-law rule was that on a charge of felony the defendant had no right to plead over if his demurrer were overruled, but that sentence must be imposed.

Reg v. *Fadermann*, 4 Cox, C. C. 359.
People v. *Taylor*, 3 Denio, 91.
Archbold Cr. Pl. (24th ed., 1910) 174.
Wharton's Cr. Pl. & Pr., secs. 404, 405.

And section 97 of the Alaskan Code recognized this common-law rule, but gave the option of pleading over.

It appears in this case, that the petitioner was given his choice, and that he deliberately placed his entire reliance on his demurrer, and accepted sentence rather than go to trial. Surely the circumstances do not require the issue by this court of the extraordinary writ of certiorari.

JESSE C. ADKINS,
Assistant Attorney General.

APRIL 18, 1913.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 502.

C. M. SUMMERS, PETITIONER,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR PETITIONER.

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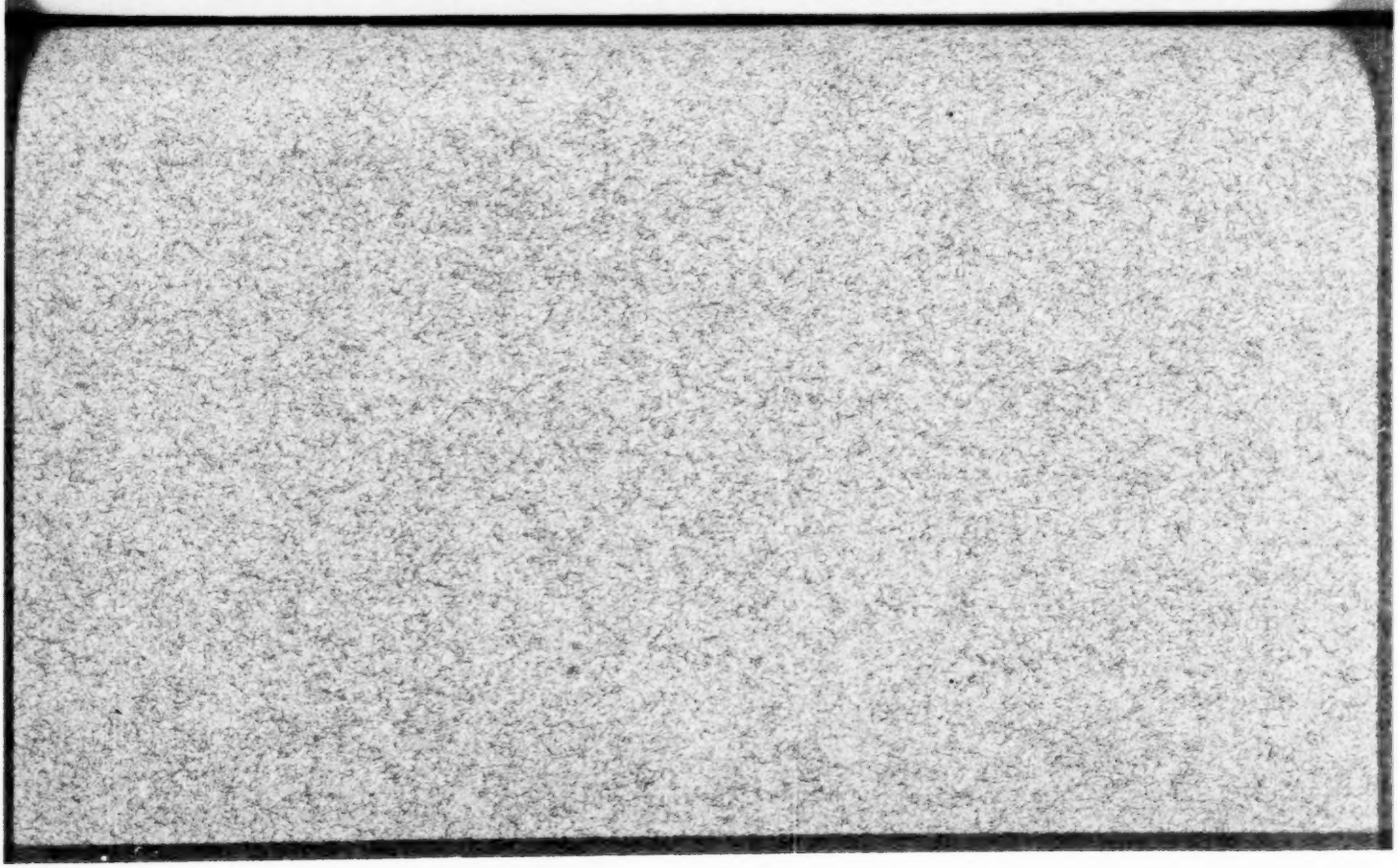

SUBJECT INDEX.

Cases Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

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No. 502.

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THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR PETITIONER.

Statement.

On the 5th day of January, 1912, the petitioner was indicted in the District Court for the Territory of Alaska, Division Number One. The indictment charged the petitioner with 56 separate and distinct crimes in violation of section 5209 of the Revised Statutes of the United States relating to National banks (Tr., pp. 2-136). Petitioner in-

terposed his demurrer to the indictment upon the ground, among others, that more than one crime was charged in the indictment, which demurrer was based upon the act of the Legislature of the State of Oregon, approved October 19, 1864, providing a criminal procedure for the State of Oregon, which contained the following provision:

> "*That the indictment must charge but one crime and in one form only.*"

The provision of law above quoted was adopted as the law of Alaska on the 17th day of May, 1884, by virtue of the provisions of the act of Congress approved May 17, 1884, entitled "An act providing civil government for Alaska," section 7 of which act reads as follows (23 Stat. L., 25-26):

> "That the general laws of the State of Oregon now in force are hereby declared to be the law in said district so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States."

The provision above quoted from the laws of Oregon was carried into the laws of Alaska and is found in Carter's Code of Alaska, Title II, section 43 (30 Stat. L., 1253).

On May 18, 1912, the demurrer of the petitioner, after argument, was overruled, and the petitioner was allowed to and did except to such ruling of the court (Tr., pp. 163-164). Thereupon the petitioner herein gave his written notice of election to stand upon said demurrer and refused to plead further to the indictment (Tr., pp. 171-172). The trial court construed this election to stand upon the demurrer and refusal to plead further as a waiver of trial by jury (Tr., p. 181), and proceeded without any trial whatever to pronounce judgment and sentence upon petitioner herein, adjudging him guilty of each one of the 56 crimes with which he was charged in said indictment, and sentenced the petitioner to five years' imprisonment for each one of the 56 crimes charged in the indict-

ment, providing that the sentences might be served concurrently (Tr., pp. 182-185). The petitioner duly excepted to the whole of said judgment and sentence, and to each and every part thereof, which exceptions were duly allowed (Tr., p. 185). Immediately thereafter the petitioner filed his petition for writ of error and assignment of errors (Tr., pp. 188-191), and the cause was removed by writ of error to the United States Circuit Court of Appeals for the Ninth Circuit.

On the 3d day of February, 1913, the United States Circuit Court of Appeals for the Ninth Circuit rendered an opinion affirming the judgment of the District Court for the Territory of Alaska, Division Number One (Tr., pp. 203-213), and such proceedings were subsequently had that this case was transferred from the said United States Circuit Court of Appeals of the Ninth Circuit to this court by writ of certiorari (Tr., pp. 217-224). Subsequently on May 1, 1913, the Attorney-General moved to advance the case upon the ground that if the demurrer should be sustained new indictments would be necessary, and that they should be filed as quickly as possible in order to avoid the bar of the Statute of Limitations. The petitioner joined in said motion and the motion was granted and the case advanced upon the docket of this court.

There are two questions involved in the case:

First. May more than one offense be joined in an indictment in the Territory of Alaska?

Second. Was it within the power of the trial court under the Constitution of the United States to adjudge the petitioner guilty and sentence him without a trial by jury, where no plea of guilty had been entered by him?

The two questions above stated were raised by exceptions to the judgment of the lower court above recited (Tr., p. 185), and by assignments of error to the effect that the court

erred in overruling the demurrer of the defendant upon the third ground of said demurrer (that more than one crime was charged in the indictment). See 4th assignment of error (Tr., p. 190), and by the 7th, 8th, and 9th assignments of error (Tr., p. 190), to the effect that the court erred in entering judgment against the defendant and in sentencing the defendant under said judgment.

Assignment of Errors.

It is our contention that the court erred:

First. In overruling the demurrer of the petitioner to the indictment herein upon the 4th ground stated in said demurrer, to wit, that more than one crime was charged in the indictment.

Second. That the court erred in entering judgment against the petitioner upon all and each and every one of the 56 counts in the indictment upon the record herein, and further erred in sentencing the petitioner under said judgment.

ARGUMENT.

I.

The court erred in overruling the contention of the petitioner that the indictment was demurrable because it charged more than one crime.

The laws of Oregon adopted May 17, 1884, for the District of Alaska provide "That the indictment shall charge but one crime." Section 1024 of the Revised Statutes of the United States permits the joinder of a number of offenses in one indictment. The question raised by the demurrer is: *Does the local practice adopted as the law of a Territory control the procedure of the territorial courts or do the provisions of the Revised Statutes of the United States providing primarily a mode of procedure in United States Circuit and District courts apply to the territorial courts?*

Annexed to this brief will be found a copy of the opinion of the trial court on the questions involved in this case (Appendix A). The copy of the court's remarks is taken from the appendix to the brief of the attorney for the District of Alaska, Division No. 1, in the Circuit Court of Appeals. The following is the language of the trial court in passing upon the question in controversy:

> "Is there anything incompatible with saying that this is not a court of the United States in the constitutional sense and the ruling of the court on this occasion? I think not, Mr. Shackleford. I concur with you when you say that it is not a court of the United States in a constitutional sense. I will go further with you and agree with you that when acts of Congress mention courts of the United States they do not mean this court, because this is a territorial court pure and simple but it exercises the jurisdiction of courts of the United States and when it exercises the jurisdiction of courts of the United States and when Con-

> gress says that all laws not locally inapplicable are transferred to the District of Alaska, then it seems to me that it is a perfectly natural construction to give it, although it is not a court of the United States. Yet when it is sitting and exercising that jurisdiction to enforce the laws of the United States, unless there is some negativing act of Congress withdrawing from it the right to use the procedure which the Federal courts use under that section of the act of Congress, it is a natural and reasonable construction to give it that not only the substantive law but the machinery, the procedure which enables the court to enforce the substantive law applies, and unless I am wrong in the ruling in the transportation case, I am satisfied that the court is right now, because one could not be correct in my judgment and the other incorrect, because if a portion of the procedure is applicable the whole of it is applicable."

We contend, therefore, that the ruling of the trial court in this case, establishing a dual system of procedure in the territory, is directly in conflict with one of the most definitely settled rules of the Supreme Court of the United States, a rule which has been settled by a line of decisions which has never before been disregarded. The ruling of the lower court and of the Circuit Court of Appeals in this case reverses not less than six distinct announcements of the rule by this court, and not less than five distinct announcements of the same rule by various circuit courts of appeals, including previous rulings of the Circuit Court of Appeals for the Ninth Circuit.

The most important cases in this court relied upon by the petitioner have recently been collected, and the rule has been most clearly stated, in a decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Cochran vs. United States*, 147 Fed., 206, 207, in which the court, speaking through Van Devanter, J., said:

> "It is important, therefore, to inquire whether the territorial district court, when exercising the jurisdiction of the Circuit and District Courts of the

United States in the trial of an offense against the laws of the United States, should conform to the practice and modes of proceeding in the Circuit and District Courts of the United States or to those prescribed by the territorial statutes. The question is not new, and the answer to it is found in repeated decisions of the Supreme Court of the United States. *Reynolds v. United States*, 98 U. S., 145, 154; 25 L. Ed., 244; *Miles v. United States*, 103 U. S., 304, 310; 26 L. Ed., 481; *Clinton v. Englebrecht*, 13 Wall., 434, 447; 20 L. Ed., 659; *Hornbuckle v. Toombs*, 18 Wall., 648; 21 L. Ed., 966; *Good v. Martin*, 95 U. S., 90, 98; 24 L. Ed., 341. These decisions hold that the territorial courts, although expressly clothed with the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States, are not courts of the United States, but legislative courts of the territories; that the practice and modes of proceeding, including that of impaneling juries, prescribed for the courts of the United States, have no application to them, and that they are bound to conform to the territorial laws upon these subjects where it is not otherwise specifically provided by some law of the United States."

A comparison of the language used by the lower court and the rule announced above demonstrates, we submit, a direct conflict between the rule of this court and the ruling of the trial court in the case at bar. In addition to the cases cited by Mr. Justice Van Devanter in the above quotation, the same proposition is plainly announced in the following cases:

Welty vs. United States, 76 Pacific (Okla.), 121;
United States vs. Haskell, 169 Fed., 449,

and in the following cases decided by the Circuit Court of Appeals for the Ninth Circuit:

Eudelman vs. United States, 86 Fed., 456.
Jackson vs. United States, 102 Fed., 473.
Corbus vs. Leonhardt, 114 Fed., 10.
Ball vs. United States, 147 Fed., 32.

Obviously, then, if Alaska is "a Territory of the United States" the rule above announced must apply to Alaska the same as it does to any other Territory of the United States. If the Circuit Court of Appeals and the trial court are in error in differentiating Alaska from the other Territories, then the rule with reference to the other Territories must apply, and we respectfully submit that the case should be reversed.

That Alaska stands on exactly the same footing as all of the other Territories of the United States was finally and conclusively decided by this court in a very recent case, which decision was rendered by this court subsequent to the indictment of the petitioner herein. *Interstate Commerce Commission vs. United States ex rel. Humboldt S. S. Co.*, 224 U. S., 474. All of the previous authorities with reference to the status of Alaska were reviewed, and it was there distinctly held that Alaska is an organized Territory of the United States.

To the same point see—

The Coquitlam vs. United States, 163 U. S., 346.
Binns vs. United States, 194 U. S., 486.
Rassmussen vs. United States, 197 U. S., 516.

We submit, therefore, that the decision of the lower courts in this cause is in conflict with the cases just above cited.

It is said by the Circuit Court of Appeals in effect (Tr., 205) that the provisions of the act of May 17, 1884 (23 Stat. L., 24), place Alaska in a different position with reference to the legislation adopted from that of the other Territories. The reason assigned is that the laws of Oregon were declared to be the laws of the district "so far as the same may be applicable and not in conflict with the provisions of the laws of the United States." In the opinion of the Circuit Court of Appeals it is claimed, therefore, that the law of Oregon prohibiting the statement of more than one crime in the indictment is not only in apparent conflict, but in actual conflict, with section 1024 Rev. Stat., a law of the

United States, and that therefore the provision of the Oregon law was not adopted as a part of the law of the district of Alaska.

The Circuit Court of Appeals has ignored the language of this court in the case of the *United States vs. Pridgeon*, 153 U. S., 48, cited in the briefs when the case was submitted in the Circuit Court of Appeals. In discussing the adoption of the law of Nebraska upon the organization of the Territory of Oklahoma in the Pridgeon case this court quoted with approval the following language (p. 53, quoted from *Ex parte Larkin*, 1 Okla., 53, 57):

> "It was intended by Congress that the laws of Nebraska should constitute a *Territorial Code* as distinguished from the laws of the United States in force in the Territory of Oklahoma, and that they should sustain the same relations to the courts and to the people of the Territory and to the legislative assembly as a code of laws enacted by the legislative assembly."

Let us see if there is any real difference between the situation created by the adoption of the laws of Oregon for the district of Alaska and that arising upon the passage of any territorial act by a territorial legislature upon the same subject. In the first place it must be conceded that no law passed by a territorial legislature which is in actual conflict with a law of the United States can have any effect. In the second place it must be remembered that the territorial legislatures were prohibited from passing any laws which were inconsistent with the laws of the United States. Section 1851 of the Revised Statutes of the United States reads as follows:

> "The legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States."

Section 1891 provides:

> "The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized, as elsewhere within the United States."

It is said by the Circuit Court of Appeals and by the trial court that these provisions of law made the Oregon statute prohibiting the statement of more than one crime in an indictment ineffective in the District of Alaska, because section 1024 is a law of the United States. If this reasoning is correct, then the decisions of this court in the cases heretofore cited, commencing with *Clinton vs. Englebrecht*, 13 Wall., 434, and ending with *Fitzpatrick vs. United States*, 178 U. S., 304, are all in error, because the sections of the Revised Statutes above quoted were in effect at the time those decisions were announced by this court.

We respectfully submit that the trial court and the court of appeals have entirely misconceived the process of reasoning adopted by this court in these leading cases. In every one of those cases there was a law of the United States apparently in conflict with a law of the Territory, but this court held that the conflict, although apparent, was not actual because the statutes of procedure found in the Revised Statutes, unless some specific intention to the contrary is to be gathered therefrom, are to be construed as applicable only in the United States District and Circuit courts. In other words, this court has held that the scope of the two conflicting sets of procedure is defined and therefore that there is no real conflict. It must be admitted that the restriction in the act extending the laws of Oregon to Alaska is of no more force and effect than the restriction placed upon legislation by a territorial legislature, and for this reason we submit that the attempt to differentiate Alaska from the other Territories in this respect is without any basis whatever.

The opinion of the trial court and of the court below establishes a condition in Alaska which has never existed in the other Territories, namely, a dual system of procedure. That is to say, the territorial court of Alaska when sitting in judgment upon a local offense is controlled by the code of local procedure in criminal matters, whereas when sitting in judgment upon an offense against the general laws of the United States it acts in the capacity of a United States Circuit or District Court and is governed by those statutes of procedure which were intended to control the proceedings of such a court. This is the very situation which this court has from time to time condemned with reference to the Territory. In applying this rejected rule of dual procedure to Alaska, the Circuit Court of Appeals asserts that the case of *Fitzpatrick vs. United States*, 178 U. S., 304, is not in point. In that case Fitzpatrick was indicted for murder under a general provision of the substantive law of the United States, to wit, under section 5339 Rev. Stat. The contention was made on behalf of Fitzpatrick that the sufficiency of the indictment should be tested by those rules which would prevail if he were on trial in a United States Circuit or District Court. In discussing this very point Mr. Justice Brown said (pp. 307-308):

> "By section 7 of an act providing civil government for Alaska, approved May 17, 1884, c. 53, 23 Stat., 24, it is enacted 'that the general laws of the State of Oregon now in force are hereby declared to be the law in said district so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States.' We are, therefore, to look to the law of Oregon and the interpretation put thereon by the highest court of that State, as they stood on the day this act was passed, for the requisites for an indictment for murder rather than to the rules of the common law."

We submit that the very thing that the petitioner in this case is insisting upon is that his indictment shall be tested

by the laws of Oregon, and we insist further that those statutes of Oregon which refer to the form and substance of the indictment were, by virtue of the decision in the Fitzpatrick case, made the criteria by which indictments should be tested in Alaska, whether the crime is of a local nature or whether it consists in a violation of some provision of a Federal statute.

The Circuit Court of Appeals in its opinion admits the existence of the doctrine laid down in the cases of *Hornbuckle vs. Toombs*, 18 Wall., 648; *Good vs. Martin*, 95 U. S., 90; *Reynolds vs. United States*, 98 U. S., 145; *Miles vs. United States*, 103 U. S., 304, and *Fitzpatrick vs. United States*, 178 U. S., 304, and then proceeds (Tr., 211-212) to hold that these authorities have no application to the Territory of Alaska because of the decision of this court in the case of *Page vs. Burnstine*, 102 U. S., 664.

The case cited and relied upon by the Circuit Court of Appeals involved the application of section 858 of the Revised Statutes to the District of Columbia. In applying this case to the Territory of Alaska the Circuit Court of Appeals has ignored the qualifications put upon the case at the time it was decided by this court, and has ignored the construction which it had previously placed upon the case of *Page vs. Burnstine* with reference to its application to Alaska.

In the case of *Corbus vs. Leonhardt*, 114 Fed., 10, the Circuit Court of Appeals for the Ninth Circuit had before it the question as to whether section 858 of the Revised Statutes was a rule of procedure in the District Court for the District of Alaska. The court said (pp. 12-13):

> "1. The objections presented by the first assignment of error are based upon the ground that the testimony of Dr. Leonhardt comes within the provisions of section 858, Rev. St., and that by this section he was not a competent witness to any transactions and conversations between himself and defendant's intestate. We are of opinion that the court did not err in admitting the testimony objected to. It is,

perhaps, true, as claimed by the plaintiff in error, that there is no decision directly in point, but the decisions bearing upon the general question lead us to the conclusion that section 858 does not apply to territorial courts. Good *v.* Martin, 95 U. S., 90, 98; 24 L. Ed., 341; McAllister *v.* U. S., 141 U. S., 174; 11 Sup. Ct., 949; 45 L. Ed., 693; Thiede *v.* Utah, 159 U. S., 510, 515; 16 Sup. Ct., 62; 40 L. Ed., 237; The Coquitlam *v.* U. S., 163 U. S., 346, 351; 16 Sup. Ct., 1117; 41 L. Ed., 184; Jackson *v.* U. S., 42 C. C. A., 452; 102 Fed., 473, 479.

"In Good *vs.* Martin, *supra*, the court said:

" 'Territorial courts are not courts of the United States, within the meaning of the Constitution, as appears by all the authorities. Clinton *v.* Englebrect, 13 Wall., 434; 20 L. Ed., 659; Hornbuckle *v.* Toombs, 18 Wall., 648; 21 L. Ed., 966. A witness in civil cases cannot be excluded in the courts of the United States because he or she is a party to or interested in the issue tried, but the provision has no application in the courts of a Territory where a different rule prevails.'

"Page *vs.* Burnstine, 102 U. S., 664; 26 L. Ed., 268, cited by the plaintiff in error, is not in opposition to these views. That decision was rendered under certain provisions of the act providing a government for the District of Columbia, *which are not applicable to Alaska*. In the course of the opinion the court said:

" 'These views do not at all conflict with the previous decisions of this court, holding that certain provisions of the General Statutes of the United States relating to the practice and proceedings in the "courts of the United States" are locally inapplicable to territorial courts.'

"By provision of section 3 of the 'Act providing a civil government for Alaska,' approved May 17, 1884 (23 Stat., 24), there was 'established a district court for said district, with the civil and criminal jurisdiction of district courts of the United States.' By section 7 of this act it was provided 'that the general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the

> same may be applicable and not in conflict with the provisions of this act or the laws of the United States.' At the time this law was enacted there were no restrictions excluding witnesses from testifying in any case. 1 Hill's Ann. Laws Or., sec. 710. These laws were in force in Alaska at the time this suit was brought and at the time of Robert Duncan's death, and were applicable to the proceedings had in this case."

No mention is made by the Circuit Court of Appeals in its opinion in the instant case of its previous decision in the case of *Corbus vs. Leonhardt*. When the case of *Corbus vs. Leonhardt* was decided by the Circuit Court of Appeals that court was evidently of the opinion that the cases of *Clinton vs. Englebrecht*, *Hornbuckle vs. Toombs*, *Good vs. Martin*, *Thiede vs. Utah*, *McAllister vs. United States*, and *The Coquitlam vs. United States*, were controlling authorities on the question of procedure in the Territory of Alaska, and that the case of *Page vs. Burnstine*, 102 U. S., 664, was not such an authority. In the opinion in the case at bar the position of the Circuit Court of Appeals for the Ninth Circuit is entirely reversed. It is distinctly stated that these cases do *not* apply to procedure in the district of Alaska and that the rule in the case of *Page vs. Burnstine* does apply. In view of the language used in the case of *Corbus vs. Leonhardt* we submit that the petitioner in this case had a perfect right to rely upon the validity of his demurrer and refuse to further plead.

The Circuit Court of Appeals in its opinion holds that section 43 of Title II of the act of March 3, 1899 (30 Stat. L., 1253, 1290), which prohibits the charging of more than one crime in an indictment applies only to the crimes denounced in that act, and proceeds to demonstrate that the crime with which this petitioner is charged is not denounced in that act but is an offense against the general laws of the United States. In summing up this part of its decision the Circuit Court of Appeals says (Tr., p. 207):

> "In brief the enacting clause provides for the procedure which shall be adopted in enforcing the penal and criminal laws which are contained in the criminal code of Alaska, and no others, and section 43 is a provision regulating procedure."

The answer to this proposition is that if the act of March 3, 1899, providing a criminal code of procedure for the District of Alaska applies only to the proceedings for the punishment of crimes therein defined, then no new or different method was provided for the punishment of crimes not therein defined, and the procedure with reference to crimes not therein defined must be as it had always been before, under the provisions of the Oregon law, extended to Alaska on the 17th of May, 1884 (23 Stat. L., 24), as construed by the Supreme Court of the United States in *Fitzpatrick vs. United States*, 178 U. S., 304, wherein it was decided:

> "That we are to look to the laws of Oregon and the interpretation put thereon by the highest court of that State as they stood on the day when this act was passed for the requisites for an indictment."

This proposition we think effectually disposes of the contention that section 43 of the Code of Criminal Procedure of the act of March 3, 1899, has no application to the crime charged in this case for the reason that it makes no difference whether section 43 applies or not, because the Oregon law which was in effect with reference to all procedure in Alaska is, and has been for some twenty or thirty years, the same as section 43. Furthermore, it is evident that there was no intention on the part of Congress to change the pre-existing law by the passage of the act of March 3, 1899. To this point we quote Senator Carter, the author of the act of March 3, 1899 (see introduction to Carter's Code of Alaska, page XVIII):

> "The two codes last named embrace a criminal code and a code of criminal procedure; a political code; a code of civil procedure; a civil code and cer-

> tain license taxes for the district. The codes were mainly copied from the statutes of the State of Oregon to the end that adjudications by the Supreme Court of that State might remain as directly in point as possible. Changes were sparingly made in the texts of the sections."

When application was made for the writ of certiorari herein, copies of the brief of the plaintiff in error in the Circuit Court of Appeals were filed in this court, and if further investigation of the history of the Alaska statutes is found necessary to the decision of this case, we respectfully request that the said brief be considered a part of this brief, and that the court consider the extended discussion of this point found on pages 33 to 74 thereof.

Before passing from the question of the application of the provision prohibiting the statement of more than one crime in an indictment, we desire to call the attention of the court to the case of *Endleman vs. United States*, 86 Fed., 456, decided by the Circuit Court of Appeals, Ninth Circuit. In that case Endleman was prosecuted for a violation of section 1955 of the Revised Statutes of the United States. The court said (p. 460):

> "The second ground of demurrer is that more than one crime is charged in the indictment against the defendant in the same count. Section 7 of the Code providing for the civil government for Alaska (23 Stat. L., 24, 25), declares that the general laws of the State of Oregon then in force are to be the law of said district."

The court then proceeds (pp. 460-461) to test the indictment for the purpose of ascertaining whether more than one crime is charged in the indictment, and the indictment is tested by the provisions of the laws of the State of Oregon. We respectfully submit, therefore, that the present opinion of the Circuit Court of Appeals is a reversal of the position taken by it previously in the case of *Endleman vs. United States*.

The only other proposition advanced in the opinion of the Circuit Court of Appeals in this case is the proposition that section 1024 of the Revised Statutes of the United States has application to procedure in the territorial courts. In fact the language of the Circuit Court of Appeals in this respect is hardly as strong as the proposition above stated. Its language is as follows (Tr., 209):

> "* * * there is no substantial reason why that clause in the act of February 26, 1853 which became section 1024 of the Revised Statutes, does not now apply to all territorial courts as well as to the Circuit and District Courts of the United States in all cases of offenses against the laws of the United States."

It is to be noted that the proposition above stated again contemplates the long abandoned doctrine of dual procedure in territorial courts. We respectfully submit that the language used by the Circuit Court of Appeals indicates that that court entertains grave doubts as to whether section 1024 applies to the Territory, since the position taken by it in its opinion is that it cannot be said that the section in question does not apply to the Territory. That is to say, in discussing the case the court below has thrown upon petitioner the burden of showing conclusively that section 1024 does not apply to the Territory. We believe the rule to be that general statutes of procedure passed by Congress without specifically mentioning the Territories must be presumed to apply only to United States Circuit and District Courts, and not to territorial courts. It has been decided that the District Court for the District of Alaska is not a Circuit or District Court of the United States. In the case of *McAllister vs. United States*, 141 U. S., 174, the Supreme Court of the United States held (shortly after civil government was extended to Alaska) that the District Court for the District of Alaska was not a court of the United States. Following this decision, some ten years later, the Circuit Court of Appeals, Ninth Circuit, certified to the Supreme Court of the United States the case of *The Coquitlam vs. United States*, 163 U. S., 346.

The question involved in that case was as to whether the District Court for the District of Alaska, when exercising its criminal admiralty jurisdiction, was a District Court of the United States within the meaning of the act allowing appeals to the Circuit Courts of Appeals. The Supreme Court of the United States held that it was not such a court, and in this connection used the following language (p. 351):

> "The district and circuit courts mentioned in the act of 1891, and whose final judgments may be reviewed by the Circuit Courts of Appeals, manifestly belong to the class of courts for which provision is made in the third article of the Constitution, namely, constitutional courts, in which the judicial power conferred by the Constitution on the General Government can be deposited, and the judges of which are entitled, by the Constitution, to receive at stated times a compensation for their services that cannot be diminished during their continuance in office, are removable from office only by impeachment, and hold, beyond the power of Congress to provide otherwise, during good behavior. *American Ins. Co. v. Canter*, 1 Pet., 511, 546; *Benner v. Porter*, 9 How., 235, 242; *Clinton v. Englebrecht*, 13 Wall., 434, 447; *Hornbuckle v. Toombs*, 18 Wall., 648, 655; *Good v. Martin*, 95 U. S., 90, 98; *Reynolds v. United States*, 98 U. S., 145, 154; *The City of Panama*, 101 U. S., 453, 465. And it was adjudged in *McAllister v. United States*, 141 U. S., 174, 181, that the District Court established in Alaska, although invested with the civil and criminal jurisdiction of a District Court of the United States was a legislative court, created in virtue of the general right of sovereignty which exists in the government, or 'in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States.' It was because the Alaska court was of the latter class that we held in *McAllister's* case that the judge of the District Court of that Territory could be suspended from office by the President under the authority conferred by section 1768 of the Revised Statutes.
>
> "It necessarily results that the Circuit Court of

> Appeals for the Ninth Circuit cannot review the final judgments or decrees of the Alaska court in virtue of its appellate jurisdiction over the District and Circuit Courts mentioned in the Act of March 3, 1891."

An examination of the decisions of this court, as well as the decision of *Corbus vs. Leonhardt*, heretofore quoted, will show that general statutes of procedure found in the Revised Statutes of the United States are construed to apply only to United States Circuit and District Courts. This was the question discussed in the case of *Clinton vs. Englebrecht*, 13 Wall., 434, where the court said (p. 445):

> "The regulations of that act (referring to the Judiciary Act of 1789) in regard to the selection of jurors have no reference whatever to the Territories. They were framed with reference to the States, and cannot, without violence to the rules of construction, be made to apply to the Territories of the United States. If, then, this subject was not regulated by Territorial law it would be difficult to say that the selection of jurors had been provided for at all in the Territories."

In the case of *Good vs. Martin*, 95 U. S., 90, 98, the Supreme Court of the United States said:

> "Territorial courts are not courts of the United States within the meaning of the Constitution, as appears by all the authorities. *Clinton et al. v. Englebrecht*, 13 Wall., 434; *Hornbuckle v. Toombs*, 18 Wall., 648. A witness in civil cases cannot be excluded in the courts of the United States because he or she is a party to, or interested in, the issue tried; but the provision has no application in the courts of a Territory where a different rule prevails."

In the case of *Good vs. Martin, supra*, the Supreme Court held that a general statute of procedure, section 858 of the Revised Statutes of the United States, had no application to the procedure in the courts of the Territory. The Circuit Court of Appeals, Ninth Circuit, in the cases of *Corbus vs.*

Leonhardt, 114 Fed., 10, before quoted, held that section 858 of the Revised Statutes has no application to the Territory of Alaska.

We take the liberty of asking this court to compare section 1024 of the Revised Statutes which is under discussion in this case, with section 858 which was under discussion in the case of *Good vs. Martin, supra*, and the case of *Corbus vs. Leonhardt, supra*, and we take the further liberty of asking this court what if any distinction exists between section 1024 and section 858 which would give to section 1024 the force of a rule of procedure in the Territory while section 858 is excluded?

The case of *Thiede vs. Utah*, 159 U. S., 510, we submit is determinative of the rule of construction contended for by the petitioner in this case, namely, that general statutes of procedure found in the Revised Statutes of the United States primarily and presumptively apply to United States Circuit and District Courts only. How can the case of *Thiede vs. Utah*, 159 U. S., 510, be distinguished from the case at bar? In the Thiede case the court was dealing with the application of section 1033 of the Revised Statutes. Section 1033 does not refer to courts of the United States or to any other courts, but simply provides an apparently general rule of procedure in capital and treason cases. If anything, section 1033 is more general in its language than section 1024. In discussing the Thiede case the court said (pp. 514-515):

> "By section 1033 Rev. Stat., the defendant in a capital case is entitled to have delivered to him at least two entire days before the trial a copy of the indictment and the list of the witnesses to be produced on the trial. *Logan v. United States*, 144 U. S., 263, 304. But this section applies to the Circuit and District courts of the United States, and does not control the practice and procedure of the courts of Utah, which are regulated by the statutes of that Territory. This question was fully considered in *Hornbuckle v. Toombs*, 18 Wall., 648, and it

was held, overruling prior decisions, that the pleadings and procedure of the territorial courts, as well as their respective jurisdictions, were intended by Congress to be left to the legislative action of the territorial assemblies and to the regulations which might be adopted by the courts themselves. See also *Clinton v. Englebrecht*, 13 Wall., 434, in which it was held that the selection of jurors in territorial courts was to be made in conformity to the territorial statutes; *Good v. Martin*, 95 U. S., 90, in which a like ruling was made as to the competency of witnesses; *Reynolds v. United States*, 98 U. S., 145, where the same rule was applied to the impanelling of grand juries and the number of jurors; also *Miles v. United States*, 103 U. S., 304, a case coming from the Territory of Utah, in which the same doctrine was announced with regard to the mode of challenging petit jurors."

How can it be held consistently that section 1033 of the Revised Statutes has no application to the Territory and at the same time be held that its neighbor, but nine sections previous, to wit, section 1024, is a statute of procedure applicable to proceedings in territorial courts? The reason we say that section 1033 is more general in its scope than section 1024 is this: Section 1024 first became a law of the United States under a title and preamble that showed a specific intention to have it apply only to United States Circuit and District courts. (See act of February 26, 1853, 10 Stat. L., 161, 163.) The title of the act introducing section 1024 into the laws of the United States is as follows:

"An act to regulate the fees and costs to be allowed clerks, marshals, and attorneys of the *Circuit and District courts of the United States*, and for other purposes." (Italics ours.)

The enacting clause of the act is as follows:

"Be it enacted, etc., that in lieu of compensation now allowed by law to attorneys, solicitors, and proctors in the *United States courts*, United States

> district attorneys, clerks of the *district* and *circuit* courts, marshals, witnesses, jurors, commissioners, and printers in the *several States*, the following and no other compensation shall be taxed and allowed."

The act proceeds to provide a schedule of fees for United States attorneys, clerks, and marshals, and incorporated in the act is section 1024. The Circuit Court of Appeals has overlooked the fact that United States attorneys have always been compensated by salary in Alaska. The first organic act (23 Stat. L., 24), the act of May 17, 1884, provides as follows (p. 26):

> "They shall receive respectively the following salaries. The governor the sum of three thousand dollars; the attorney the sum of two thousand five hundred dollars."

Subsequent acts of Congress have increased the salaries of these officials, but at no time have they been compensated except by salary.

After the passage of the act of February 26, 1853, in which we first find the language of section 1024 Rev. Stat., it was soon discovered that the act did not extend to the Territories. The provisions of the act in so far as they related to fees and compensation were extended to three Territories only, by the act of March 3, 1855. The Territories to which the act was extended were Minnesota, New Mexico, and Utah. (See 10 Stat. L., 671.) In this connection the following concession is made in the opinion of the Circuit Court of Appeals (Tr., 210):

> "It is true that there were at that time other Territories of the United States than those which were specifically named."

This concession effectually disposes of the proposition that there was an intention to extend the act and all of its provisions generally to all the Territories. Subsequently on the 7th of August, 1882, Congress extended the fees provided

by the act of February 26, 1853, to the Territories of New Mexico and Arizona, New Mexico having in the meantime been subdivided. (See 22 Stat. L., 344, the language of which is as follows):

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the act of the Congress of the United States entitled 'An act to regulate the fees and costs to be allowed clerks, marshals, and attorneys of the Circuit and District courts of the United States, and for other purposes,' approved February 26th, eighteen hundred and fifty-three, and section eight hundred and thirty-seven of the Revised Statutes of the United States, is extended to the Territories of New Mexico and Arizona, and shall apply to the fees of all officers in such Territories; but the district attorney shall not, by fees and salary together, receive more than three thousand five hundred dollars per year, and all fees or moneys received by him above said amount shall be paid into the Treasury of the United States."

The above expression of the will of Congress showing that Congress held the act of February 26, 1853, not applicable to the Territories unless specifically extended thereto, we believe conclusively disposes of the proposition laid down by the Circuit Court of Appeals that section 1024, when it became a part of the Revised Statutes of the United States, became applicable to the Territory.

It must necessarily be assumed, therefore, that section 1024 was never intended by Congress to apply to the district of Alaska. The section prohibiting the charging of more than one crime in an indictment is common to all of the States and Territories of the Pacific slope. It was adopted in Montana prior to 1873 (see sections 184-188, Laws of Montana, 1871 to 1872); Arizona prior to 1872 (see section 217, Laws of Arizona, 1864 to 1871); California prior to 1853 (see Laws of California, 1850 to 1853, section 241); Nevada prior to 1874 (see section 1862, Compiled Laws of Nevada, vol. 1, 1861 to 1873); Utah, 1878 (see section 153, Laws of

Utah, 1878); Washington (see vol. 2, Hill's Code of Washington, p. 479, sec. 1230); Idaho prior to 1875 (see section 237, Laws of Idaho, 1874 to 1875).

It must be assumed that Congress was aware of the existence of these laws in the western Territories when it passed the Edmund's act in 1882 (22 Stat. L., 30). Without question it is there recognized that section 1024 of the Revised Statutes has no application to the Territories of the Pacific slope wherein polygamy was most prevalent and wherein also the local law prohibited the charging of more than one crime in an indictment. By section 4 of the Edmunds act Congress made special provision authorizing the joinder of separate offenses of polygamy and kindred social crimes in one indictment.

On the 4th of March, 1909, an act of Congress was approved which is known as the New Penal Code (35 Stat. L., 1088). That portion of the penal law of the United States which has particular and special application to Territories of the United States is codified and incorporated in the new penal act as chapter 13 and entitled "Certain offenses in the Territories." The first five sections of the chapter read as follows:

> "SEC. 311. Except as otherwise expressly provided, the offenses defined in this chapter shall be punished as hereinafter provided, when committed within any Territory or District, or within or upon any place within the exclusive jurisdiction of the United States.
>
> "SEC. 312. Whoever shall sell, lend, give away, or in any manner exhibit, or offer to sell, lend, give away, or in any manner exhibit, or shall otherwise publish or offer to publish in any manner, or shall otherwise have in his possession for any such purpose any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article of an immoral nature, or any drug or medicine, or any article whatever, for the prevention of

conception, or for causing unlawful abortion, or shall advertise the same for sale, or shall write or print, or cause to be written or printed, any card, circular, book, pamphlet, advertisement, or notice of any kind, stating when, where, how, or of whom, or by what means, any of the articles above mentioned can be purchased or obtained, or shall manufacture, draw, or print, or in anywise make any of such articles, shall be fined not more than two thousand dollars, or imprisoned not more than five years, or both.

"SEC. 313. Every person who has a husband or wife living, who marries another, whether married or single, and any man who simultaneously, or on the same day, marries more than one woman, is guilty of polygamy, and shall be fined not more than five hundred dollars and imprisoned not more than five years. But this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage shall have been absent for five successive years, and is not known to such person to be living, and is believed by such person to be dead, nor to any person by reason of any former marriage which shall have been dissolved by a valid decree of a competent court, nor to any person by reason of any former marriage which shall have been pronounced void by a valid decree of a competent court, on the ground of nullity of the marriage contract.

"SEC. 314. If any male person cohabits with more than one woman, he shall be fined not more than three hundred dollars, or imprisoned not more than six months, or both.

"SEC. 315. *Counts for any or all of the offenses named in the two sections last preceding may be joined in the same information or indictment.*"

It is apparent, therefore, that the laws of Congress applicable to the Territories at the present time permit the joinder in one indictment in territorial courts of counts relating to polygamy and cohabitation only, and that Congress has expressed its intention that in these specific instances only shall the local law of the Territory be abrogated.

Before passing from the discussion of this portion of the case we desire to call the attention of the court to the decision of the Circuit Court of Appeals, Ninth Circuit, in the case of *Ball vs. The United States*, 147 Fed., 32, which holds that section 1033 of the Revised Statutes of the United States has no application to the District of Alaska and does not control the practice and procedure in the territorial court. If 1033 has no application to the District of Alaska under the ruling of the Circuit Court of Appeals, how can 1024 be held to apply?

All through the statutes of the United States from a very early day the following custom is apparent with reference to legislation, to wit, whenever a statute of procedure is passed it presumably affects only procedure in the United States Circuit and District Courts, and whenever Congress desires to give to it a broader application it expresses a deliberate intention to have the statute of procedure apply also to the Territories. There is no better example of such custom than the act of July 22, 1913, which reads as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That whenever there shall be several actions or processes against persons who might legally be joined in one action or process, touching any demand or matter in dispute before a court of the United States *or of the Territories thereof*, if judgment be given for the party pursuing the same, such party shall not thereon recover the costs of more than one action or process, unless special cause for several actions or processes shall be satisfactorily shown on motion in open court.
>
> "SEC. 2. *Be it further enacted*, That whenever proceedings shall be had on several libels against any vessel and cargo which might legally be joined in one libel before a court of the United States *or of the Territories thereof*, there shall not be allowed thereon more costs than on one libel, unless special cause for libelling the vessel and cargo severally shall be satisfactorily shown as aforesaid. And in pro-

ceedings on several libels or informations against any cargo or parts of cargo or merchandise seized as forfeited for the same cause, there shall not be allowed by the court more costs than would be lawful on one libel or information, whatever may be the number of owners or consignees therein concerned; but allowance may be made on one libel or information for the costs incidental to several claims: *Provided*, That in case of a claim of any vessel or other property seized on behalf of the United States and libelled or informed against as forfeited under any of the laws thereof, if judgment shall pass in favor of the claimant, he shall be entitled to the same upon paying only his own costs.

"SEC. 3. *And be it further enacted*, That whenever causes of like nature or relative to the same question shall be pending before a court of the United States *or of the Territories thereof*, it shall be lawful for the court to make such orders and rules concerning proceedings therein as may be conformable to the principles and usages belonging to courts for avoiding unnecessary costs or delay in the administration of justice, and accordingly causes may be consolidated as to the court shall appear reasonable. And if any attorney, proctor, or other person admitted to manage and conduct causes in a court of the United States *or of the Territories thereof*, shall appear to have multiplied the proceedings in any cause before the court so as to increase costs unreasonably and vexatiously, such person may be required by order of court to satisfy any excess of costs so incurred.

"Approved, July 22, 1913."

An examination of the Revised Statutes of the United States will show numerous other sections in which Congress has been careful to apply certain methods of procedure by specific enactment, to the Territories. In such cases the word "Territory" or "territorial" is always found in the statute. (See sections 184, 362, 370, 567, 568, 569, 699, 702, 703, 704, 713, 748, 811, 823, 849, 868, 869, 871, 982, 1025, 1883, 1982, 1986, 2165, 2203, 5237, 5239, 5270, Rev. Stat.; see also Bankrutcy Act, Rev. Stat., Supp. V. 2, p. 843.)

The question of procedure involved in this case upon the demurrer to the indictment has been discussed before the constitutional question involved in the case because we feel that the ruling of the lower court is so clearly in violation of the general system of statutory construction under the settled rule of this court with reference to all of the Territories, including Alaska, that the case should be reversed upon the question of procedure. In that event it will not be necessary to pass upon the constitutional questions involved herein.

It is hardly necessary to call the court's attention to the fact that is conceded by the Attorney General's motion to advance, that if the Government is in error in this case, there is time left in which to reindict petitioner if the Government's case be meritorious. The tendency of the courts has been to disparage the raising of questions of procedure where the same will result in such delay that the Government is deprived of its criminal remedy. For this reason we desire to call the court's attention to the fact that petitioner appealed to the Circuit Court of Appeals on the same day that judgment was rendered against him and filed his petition for a writ of certiorari in this court even before his petition for rehearing was disposed of in the Circuit Court of Appeals. A reversal of this case, it is conceded, will not defeat the ends of justice.

II.

The court erred in entering judgment against and sentencing the petitioner, since it is not within the power of a judge in a criminal case, in the absence of a plea of guilty, to make a finding of fact as to the guilt of a defendant unless a finding of fact to the same effect has been made previously by a jury of twelve men pursuant to the Constitution of the United States.

Upon this question the following appears to be the state of the law in the Supreme Court of the United States:

In the case of *Callan vs. Wilson*, 127 U. S., 540, the defendant was charged with the crime of conspiracy in the police court of the District of Columbia, convicted by the judgment of that court without a jury, and fined $25. The defendant appealed his case and then defaulted in the payment of his fine and withdrew the appeal, went to jail and sued out a writ of *habeas corpus* against the United States marshal for the District of Columbia. It was held that the offense with which he was charged was a crime and that the judgment of the lower court was void, not having been supported by the verdict of a jury. The court accordingly ordered the discharge of the petitioner from custody.

One of the most recent cases on the question of the right to jury trial is the case of *Schick vs. United States*, 195 U. S., 65. In the opinion of the court, at page 70, the following language of the opinion in *Callan vs. Wilson* is quoted with approval:

> "Except in that class or grade of offenses called petty offenses, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by, or under the authority of, the United States, secures to

> him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offense charged."

In the case of *Schick vs. United States*, above cited, the court held that, in a prosecution under section 11 of the oleomargarine act, which reads as follows: "That every person who knowingly purchases or receives for sale any oleomargarine which has not been branded or stamped according to law, shall be liable to a penalty of $50 for each such *offense*," the defendant was really not charged with a crime, but with a petty *offense;* therefore, under the ruling in the case of *Callan vs. Wilson, supra*, a jury might be waived. Mr. Justice Brewer in his opinion further discusses the provisions of the Constitution in regard to the right to jury trial as reported to the convention, which were as follows:

> "The trial of all criminal *offenses* shall be by jury,"

and shows that by unanimous vote the draft of the Constitution was amended so as to read "The trial of all *crimes*." Under the peculiar circumstances of that case, which simply involved the payment of a fine of $50, it was held that the defendants were charged with a petty offense only, and might waive a trial by jury.

It will be seen also that the question involved herein is one that this court will require to be discussed. We quote from the Schick case (p. 67):

> "In each case the parties in writing waived a jury, and agreed to submit the issues to the court. * * * The waiver of a jury was not assigned as error, nor referred to by counsel at the hearing before us, either in brief or argument. The question of its effect was suggested by this court and briefs called for from the respective parties."

It is unnecessary to discuss at length the case of *Rassmussen vs. United States*, 197 U. S., 516. It is sufficient

to say that in that case the act of Congress providing a criminal code for Alaska was declared unconstitutional in so far as it reduced the number of jurors required for the trial of a misdemeanor from twelve to six.

The decision in the case of *Thompson vs. Utah*, 170 U. S., 343, is determinative of the question involved in this case. While we ask an examination of all these authorities, we take the liberty of quoting the following language from that opinion (p. 353):

> "It is said that the accused did not object until after verdict to a trial jury composed of eight persons, therefore, he should not be heard to say that his trial by a such a jury was in violation of his constitutional rights. It is sufficient to say that it was not in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt."

We especially ask the court to read in this connection also the case of *Cancemi vs. People*, 18 N. Y., 131. In that case one of the twelve jurors was withdrawn upon the express consent and stipulation of the prisoner, who was tried by the eleven remaining jurors. The court said:

> "If the deficiency of one juror may be waived there appears to be no good reason why a deficiency of eleven might not be and it is difficult to see why the entire panel might not be dispensed with and the trial committed to the court alone."

In discussing the early English cases the court used the following language:

> "The opinion of the judges in the Court of the King's Bench in the case of Lord Dacres, tried in the reign of Henry VIII for treason, strongly fortified the conclusion above expressed. One question in the case was whether a prisoner might waive a trial by his peers and be tried by the country, and the judges agreed that he could not, for the statute of Magna

> Charta was in the negative and prosecution was at the King's suit. Woodeson, in his lectures (vol. 1, p. 346), says the same question was resolved on the arraignment of Lord Sudley in the seventh year of the reign of Charles I, and that the reason was that the mode of trial was not so broadly a privilege of the nobility as a part of the law of the land, like the trial of commoners by commoners enacted or rather declared by Magna Charta. In 3 Inst., 30, the doctrine is stated that 'a nobleman cannot waive his trial by his peers and put himself upon the trial of the country, that is, of twelve freeholders; for the statute of Magna Charta is that he must be tried *per pares*,' and so it was resolved in Lord Dacres' case."

A lengthy brief citing the cases in which the question now being discussed is involved is unnecessary, for the reason that the matter is thoroughly digested in a most exhaustive foot note to the case of *Re McQuown*, found in the 11th L. R. A., new series, at page 1136. The following is the statement of the digester:

> "Although the contrary has been asserted many times, yet, when confined to cases involving the waiver by one charged with a crime, of a trial by jury, as distinguished from other questions, such as consenting to trial by a less number of jurymen than provided for by the Constitution, or waiver of the disqualification of certain jurors and the like, *the proposition may be safely asserted that the courts are unanimous in holding that, as to felonies, in the absence of statutory authority, a defendant cannot waive a jury trial, and an attempt so to do, followed by a trial before the court without a jury, will be of no avail, and a judgment rendered by the court will be erroneous if not void.*"

In the note above quoted are collected all of the cases bearing upon the subject. The decision of the Circuit Court of Appeals for the First Circuit in the case of *Keliher vs. United States*, 193 Fed., 8, settles beyond question the proposition that a violation of the National Banking Act, with

which defendant in this case is charged, is a felony since the passage of the penal code act of March, 1909 (35 Stat. L., 1088).

We respectfully submit that since the question involved in this case must arise now or later upon *habeas corpus*, as in *Callan vs. Wilson*, the questions involved herein should be disposed of by this court expeditiously upon this writ of certiorari.

The writ of certiorari in the case at bar was granted on the 28th of April, 1913. On the 5th of May, 1913, an opinion was rendered by the Circuit Court of Appeals for the Ninth Circuit upon a petition for rehearing (Tr., pp. 220-221), in which the Circuit Court of Appeals discussed for the first time the question of the right of jury trial, and a few comments upon the same are necessary in addition to the authorities heretofore cited. The statement is made by the Circuit Court of Appeals that there was no assignment to direct the attention of that court to the alleged error. The third specification of error in the brief of the plaintiff in error in the Circuit Court of Appeals, copies of which are on file herein (see page 6 of said brief), recites that the court erred in rendering and entering judgment against the defendant upon the record herein, and the third specification of error is argued on pages 76 and 77 of the brief of the plaintiff in error in the Circuit Court of Appeals. It was clearly stated in that argument that the plaintiff in error claimed the protection of the Constitution of the United States. The case of *Rassmussen vs. United States*, 197 U. S., 516, which holds that the constitutional right of jury trial applies to the Territory of Alaska, is cited at page 76 of that brief. The case of *Thompson vs. Utah*, 170 U. S., 343, which holds that the right to a jury trial cannot be waived, is cited at page 76 of that brief.

A discussion of the third specification of error is at the end of the brief of plaintiff in error in the Circuit Court of Appeals. It may be that the argument in support of this

assignment of error was not noticed by the Circuit Court of Appeals on the original hearing, but through no fault of the petitioner, as the question is plainly raised and the two leading authorities on the subject are distinctly cited.

The court proceeds then to hold that section 97 of the Alaska Code of Criminal Procedure applies to the proceedings in this case and bars the defendant from raising the question that he was not tried by a jury. The court further says, "There is no question here of a waiver of a jury trial." The record in the case before the Circuit Court of Appeals shows the contrary. (See Tr., p. 181, which reads as follows):

> "* * * and the court being fully advised in the premises rules that the Federal procedure prevails in all proceedings in this cause; but that the defendant C. M. Summers may waive trial by jury if he so elects and have judgment entered against him pursuant to the provisions of section 97, part II, of the Alaska Penal Code."

Furthermore, in the opinion of the trial court, which was before the Circuit Court of Appeals as an exhibit to the Government's brief, the following language is to be found:

> "In the case of the United States *vs.* Summers, while I am satisfied as held yesterday, that the Federal practice prevails in Alaska, yet I am also satisfied that the practice can be waived so long as it is invited by the defendant himself."

After these remarks and the recital in the journal before mentioned, the court proceeded to and did pronounce judgment against the defendant (Tr., pp. 182-185).

It was distinctly held by the trial court, therefore, that the Federal practice prevailed and that section 97 did not prevail as a matter of law in the trial of the petitioner, but the election of the petitioner to stand upon section 97 was construed by the court to be a waiver of a trial by jury and the court proceeded thereafter to find the defendant guilty

upon each of the counts in the indictment, which finding of fact was not supported by the finding of the only tribunal, a legally constituted jury, that could determine that fact in the absence of a plea of guilty.

If the demurrer of the petitioner in this case is to be finally overruled herein it can only be overruled upon the ground that the local practice does not prevail in a proceeding wherein the Government attempts to punish for violation of its general statutes as distinguished from its local territorial statutes. It follows, therefore, that the Circuit Court of Appeals cannot sustain its position both as to the demurrer and the judgment, for if the demurrer is sustained, it is upon the ground that the local practice does not prevail, and the judgment as sustained by the Circuit Court of Appeals is upon the ground that there was no waiver, but that the judgment was supported by the local practice. If the demurrer be overruled, under section 1024, then the judgment is void by virtue of the force of section 1026, Rev. Stat., which provides as follows:

> "In every case in any court of the United States where a demurrer is interposed to an indictment, or to any count or counts thereof, or to any information, and the demurrer is overruled, the judgment shall be *respondeat ouster;* and thereupon a trial may be ordered at the same term or a continuance may be ordered, as justice may require."

Section 1032, Rev. Stat., provides:

> "When any person indicted for any offense against the United States, whether capital or otherwise, upon his arraignment stands mute, or refuses to plead or answer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf, in the same manner as if he had pleaded not guilty thereto. And when the party pleads not guilty, or such plea is entered as aforesaid, the cause shall be deemed at issue, and shall, without further ceremony, be tried by a jury."

The position of petitioner herein that the indictment was demurrable under the local law and that judgment could be entered against the defendant under the provisions of the local law are entirely consistent. The position of the Circuit Court of Appeals that the demurrer should be overruled on the ground that the local law is not applicable, but that the judgment shall be sustained under the provisions of the local law, is, we submit, necessarily inconsistent.

The construction placed by the lower court upon the acts of the defendant to the effect that he had waived his right to jury trial necessarily raises the question in this court. Can a defendant in a criminal case, by waiver, transfer jurisdiction from a jury to a judge to make the finding of fact as to his innocence or guilt?

We respectfully submit that the judgment of the lower court should be reversed.

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APPENDIX A.

Oral Opinion of Trial Court, Case at Bar.

TEN O'CLOCK A. M., MONDAY, *May* 20, 1912.

The COURT (LYONS, *J.*): I have given the matter considerable consideration, gentlemen, and gave it extended consideration at the time of an analogous question in the case of the Transportation cases—in the case of the United States *versus* The Pacific and Arctic Railway and Navigation Company, and others. In that case the demurrer was interposed to the indictment and alleged, among other things, that the indictment joined more than one count and for that reason was not in accordance with the provisions of the local code. The court held that the prosecution being for an infraction of the laws of the United States, general laws of the United States, or one of them, the procedure provided for in the local code did not apply and overruled the demurrer for that reason.

The question is now raised as to whether or not after proceeding beyond the indictment whether or not the Federal procedure still obtains or the local code governs. It is true, as argued by counsel for the defendant, that the court based its ruling largely in the Transportation cases on the construction of three sections of the criminal code, to wit: 1, 10, and 13; which seemed to the court to negative the idea that only one system of practice obtains in Alaska, and that section 10 in the nature of things must contemplate two procedures, for it says that grand juries shall be selected and summoned and their proceedings shall be in accordance with the laws of the United States. If the letter of that statute is followed, it renders nugatory the entire local code governing the trial of local cases; so the court held that what the statute must mean was that when prosecuting cases for

infractions of the general laws that the law means that grand juries shall be selected and summoned and their proceedings shall be governed by the general laws of the United States, but when the grand jury is operating within the jurisdiction of a territorial organization purely, then the grand jury is summoned and selected according to the laws of the United States, the general laws of the United States, but their procedure is governed by the local code.

Proceeding, now, and assuming that the court was right in so holding, and I will say, gentlemen, that the more I consider the question—while I realize it is not entirely free from difficulty—the more I reflect on the matter, the more I am convinced that that is the only theory upon which to proceed to give all the laws which apply to Alaska a reasonable construction. Section 1891 of the Revised Statutes of the United States provides the Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories and in every Territory wherever organized as elsewhere within the United States. There has been some controversy in the past whether or not that section applied to the District of Alaska, but that has been settled by the Nagle case that Alaska is an organized Territory within the meaning of that statute, and that all of the laws of the United States and the Constitution, unless the laws are locally inapplicable, are the laws of the District of Alaska the same as they are in every part of the United States. That being true, what position are we in? We read, then, in conjunction with that the opening section of the Code of Criminal Procedure, which provides as follows:

> "That proceedings for the punishment and prevention of the crimes defined in Title I of this act shall be conducted in the manner herein provided."

We find in Title I that it refers to the Criminal Code of the District of Alaska. Under the maxim that the expression of one means the exclusion of others, the natural and

inevitable construction placed upon that, the opening section, is that the Code of Criminal Procedure applies to the crimes defined in Title I, which are laws peculiarly local in their nature and only refer to the District of Alaska and to no other part of the United States. Now, proceeding, then, and it seems to me that is a fair and reasonable construction of that section, taking that in conjunction with the section of the United States statutes just read, section 1891, and what have we? We have section 1891 transferring all the laws of the United States to the District of Alaska not locally inapplicable. Now, why say that transfers the substantive law but not the law of procedure? It would seem that if Congress conceived the idea it was necessary to transfer the substantive law, that unless its will were declared in specific terms to the contrary that the law of procedure should also follow. Now, what is there about the Federal practice which cannot be considered applicable in the District of Alaska? The peculiar character of the crime charged? The same is true of the Transportation case, which has been deemed wise to allow the joinder of more than one count. If that is true in the State of Washington, why shouldn't it be true in the District of Alaska? Of course, I don't mean to say that if there is anything in the acts of Congress that indicate the contrary that this court has any right, or any other court has any right, to say that because it looks reasonable it must be so, but if it looks reasonable and if it is in consonance with the reasonable construction of our own statute, and if there is nothing in any of the acts of Congress which declare to the contrary, then why should Congress say we will give you the substantive law, but we will withhold the ordinary machinery which is followed in the trial of an infraction of such law?

Now, let us see if there is anything in conflict with that in the cases that counsel cites. In the Coquitlam case the only question involved was whether or not an appeal would lie from this District Court to the Circuit Court of Appeals, the Circuit Court of Appeals having been constructed by

the act of 1891. It was conceived that because the words "District and Circuit Courts of the United States" were used and only referred to constitutional courts, this not being a constitutional court, therefore no appeal would lie from it. The Supreme Court of the United States held that it was a Supreme Court of the Territory, the highest court in the Territory, and for that reason under other provisions of the same act an appeal would lie to the Circuit Court of Appeals for the Ninth Circuit. In the McAllister case, counsel is right when he contends that the question was as to whether or not the President of the United States could remove or suspend a judge of this court, and the majority of the court held that he could, and held that the act under which he dismissed Judge McAllister and which act excepted from the power of the President to so dismiss courts of the United States, Justice Harlan, in writing the opinion of the majority of the court, held that this was not a court of the United States under the third article of the Constitution, which provides that the judicial power of the United States shall be reposed in a Supreme Court and as many inferior courts as Congress may from time to time organize and create, but that this was a court created by Congress under the general provisions of the Constitution, which provide that Congress has complete control over the Territories and may legislate for them as it sees fit.

Is there anything incompatible with saying that this is not a court of the United States in the constitutional sense and the ruling of the court on this occasion? I think not, Mr. Shackleford. I concur with you when you say it isn't a court of the United States in a constitutional sense. I will go further and agree with you that when the acts of Congress mention courts of the United States, they don't mean this court, because this is a territorial court pure and simple, but it exercises the jurisdiction of courts of the United States and when it exercises the jurisdiction of courts of the United States, and when Congress says that all laws not locally inapplicable are transferred to the District of Alaska,

then it seems to me that it is a perfectly natural construction to give it, although it is not a court of the United States. Yet, when it is sitting and exercising that jurisdiction to enforce the laws of the United States, unless there is some negativing act of Congress withdrawing from it the right to use the procedure which the Federal courts use, under that section of the act of Congress, it is a natural and reasonable construction to give it that not only the substantive law but the machinery, the procedure which enables the court to enforce the substantive law, applies, and unless I am wrong in the ruling in the Transportation case, I am satisfied that the court is right now, because one couldn't be correct, in my judgment, and the other incorrect, because if a portion of the procedure is applicable, the whole of it is applicable. Therefore, it seems to me that the only procedure that can be followed in this case is the Federal procedure, and that deprives the court of the power to enter a judgment in a criminal case against any man without a trial.

TEN O'CLOCK A. M., TUESDAY, *May* 21, 1912.

COURT: In the case of the United States against Summers, while I am satisfied, as held yesterday, that the Federal practice prevails in Alaska, yet I am also satisfied that practice can be waived so long as it is invited by the defendant himself. However, I wasn't giving this matter any consideration yesterday. The only question before the court for consideration was whether or not the Federal practice or the local practice obtained, and I am satisfied that the Federal practice obtains; that is, I say it is a matter of procedure, and I am satisfied that the defendant can waive any procedure under the Diaz case and elect to stand on the local practice. Now, at this time, I understand the defendant still asks to be sentenced without proceeding further with the trial.